(CALLS).[42] The *CALLS Order* resolved major outstanding issues concerning access charges of price-cap ILECs by determining the appropriate level of interstate access charges and by converting implicit subsidies in interstate access charges into explicit, portable, and sufficient universal service support.[43] The adoption of the *CALLS Order* moved the Commission a step closer to its access charge reform goals for dominant carriers. The *CALLS Order* is interim in nature, covering a five-year period[44]; its reforms became effective on July 1, 2000.

20. Emergency Petitions: In February and May 2000, we received two declaratory ruling petitions asking that we prohibit AT&T from withdrawing its interexchange services from customers of CLECs pending the outcome of the rulemaking proceedings relating to CLEC access charges. We subsequently sought comment on these petitions.[45]

III. CLEC SWITCHED ACCESS SERVICES

A. Overview

21. Congress and the Commission have adopted policies designed to encourage competition for local exchange and exchange access services. Although competition for access services existed to some extent prior to 1996, the 1996 Act created new opportunities for competing access providers by opening the local exchange market to competition.[46] As a result, competition for local exchange and exchange access service is taking root: between 1996 and 1999, the number of competitive LECs increased from 94 to 349.[47] During their development, CLECs have been largely unregulated in the manner that they set their access rates. We note, however, that section 201 gives us the authority to ensure that CLEC rates are just and reasonable.[48]

22. Our review of the record reveals that CLEC access rates vary quite dramatically and, on the average, are well above the rates that ILECs charge for similar service. Sprint, WorldCom and AT&T have submitted information on the CLEC access charges for which they have been billed. These data sets reveal a strikingly broad range of rates. Some competitive LECs charge at or even below 1 cent per minute; indeed, it appears that many CLECs are

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[42] *CALLS Order,* 15 FCC Rcd 12962.

[43] *Id.* at 12974-76.

[44] *Id.* at 12977.

[45] *Emergency Petition Public Notice*, DA-00-1067, 2000 WL 217601.

[46] *See, e.g.*, 47 U.S.C. § 251.

[47] Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. 9.6 (Dec. 2000).

[48] *See generally Access Reform NPRM*, 11 FCC Rcd at 21474-76; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report & Order, 85 FCC 2d 1, ¶¶ 88-96 (1980).

charging approximately the ILEC access rate.[49] On the other hand, certain CLECs are charging above 9 cents per minute and the weighted average of CLEC access rates falls above 4 cents per minute.[50] AT&T estimates that approximately 100 CLECs have tariffed rates above 2.5 cents per minute and 60 have per-minute rates above 5.0 cents.[51] AT&T further asserts that, in 2000, it was billed for $106 million in CLEC access charges, representing a premium of $92 million over what the competing ILECs would have billed for the same number of minutes of service.[52] While we have questions about AT&T's calculation of this premium,[53] there can be little question that CLECs are adding dramatically to the overall level of access charges that IXCs are paying. We are concerned that the higher CLEC rates may shift an inappropriate share of the carriers' costs onto the IXCs and, through them, the long distance market in general.

23. Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate.[54] AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable.[55] We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts.[56] And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute. This uncertainty, in turn, poses a significant threat to the

[49] *See* AT&T Safe Harbor Comments at 7.

[50] *See infra* paragraphs 48-49

[51] *See* AT&T Safe Harbor Comments at 7.

[52] AT&T Safe Harbor Comments, Appendix A.

[53] For example, it is unclear whether AT&T's calculation of the competing ILEC rate includes certain flat-rated elements.

[54] Buckeye Comments at 3; Sprint Reply Comments at 28-30; Allegiance Comments at 18-19; MGC Comments at 7. In performing these calculations, Sprint appears typically to have used the rate of the competing ILEC as the just and reasonable rate.

[55] *See, e.g., Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 682 (E.D. Va. 2000).

[56] *See Advamtel, LLC v. AT&T Corp.*, CIV. A. No. 00-643-A (E.D. Va., Alexandria Div., complaint filed Apr. 17, 2000); *Advamtel, LLC v. Sprint Communications.*, CIV. A. No. 00-1074-A (E.D. Va., Alexandria Div., complaint filed Apr. 17, 2000); *Total Telecomm. Servs., Inc. v. AT&T Corp.*, FCC 01-84, File No. E-97-003 (rel. Mar. 13, 2001); *Time Warner Telecom, Inc. v. Sprint Communications Company, L.P.*, File No. EB-00-MD-004 (complaint filed Mar. 16, 2000); *U.S. TelePacific Corp. v. AT&T Corp.*, File No. EB-00-MD-010 (complaint filed June 16, 2000); *AT&T Corp. v. Business Telecom, Inc.*, File No. EB-01-MD-001 (complaint filed Jan. 16, 2001); *Sprint Communications Company, L.P. v. Business Telecom, Inc.*, File No. EB-01-MD-002 (complaint filed Jan. 16, 2001).

continued development of local-service competition, and it may dampen CLEC innovation and the development of new product offerings.[57]

24. Additionally, IXCs have threatened to stop delivering traffic to, or accepting it from, certain CLECs that they view as over-priced. Thus, AT&T has notified a number of CLECs that it refused to exchange originating or terminating traffic.[58] In some instances, AT&T has terminated its relationship with CLECs and is blocking traffic, thus raising various consumer and service quality issues.[59] These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion.[60] Once one or more IXCs refuse to do business with a CLEC, it will become impossible for that CLEC's end users to reach, or receive calls from, some parties outside of the local calling area. If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through. We are particularly concerned with preventing such a degradation of the country's telecommunications network. It is not difficult to foresee instances in which the failure of a call to go through would represent a serious problem, and, in certain circumstances, it could be life-threatening. Accordingly, the public interest demands a resolution to this set of problems.

25. Given the state of the marketplace for CLEC access services, and our judgment that more serious developments could loom in the future if we do not take action, we are persuaded of the need to revisit these issues in a global fashion. Previously, the Commission refrained from involving itself in a general examination of the reasonableness of CLEC access rates, ruling instead that any unreasonable rates could be addressed through the section 208 complaint process. However, this regime has often failed to keep CLEC access rates within a zone of reasonableness. It now appears that the best means of proceeding is to restructure and partially deregulate the environment in which CLECs provide access service, providing a bright-line rule that will facilitate effective enforcement. Additionally, the record indicates that numerous questions about the reasonableness of CLEC rates exist in the industry. Several parties have already filed with the Commission informal complaints raising this issue in order to preserve their claims from lapse.[61] We are concerned that a flood of unreasonable-rate complaints could overtax the Commission's resources to deal with such proceedings in a manner that is timely and efficient yet gives each complaint the attention it deserves.

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[57] MTA Emerg. Pet. Comments at 4; Minnesota CLEC Consortium Request for Emergency Relief, CC Dkt. No. 96-262, at 3 (filed May 5, 2000).

[58] *See* RICA Request for Emergency Relief, CC Dkt. No. 96-262, at 2-3 (filed Feb. 18, 2000); Minnesota CLEC Consortium Request for Emergency Relief at 2-3; Buckeye Emerg. Pet. Comments at 1-3; MTA Emerg. Pet. Comments at 3-4.

[59] *See Advamtel*, 118 F. Supp. 2d at, 682; RICA Comments at 4-7, 12-13. *Cf.* Sprint Comments at 24-25; CCG Comments at 5.

[60] MTA Emerg. Pet. Comments at 4; Minnesota CLEC Consortium Request for Emergency Relief at 3.

[61] *See, e.g., AT&T v. CFW Communications Company*, File No. EB-01-MDIC-0003 (informal complaint filed Jan. 16, 2001); *AT&T v. Commonwealth Telephone*, File No. EB-01-MDIC-0004 (informal complaint filed Jan. 16, 2001); *Sprint v. e.spire Communications, Inc.*, File No. EB-01-MDIC-0015 (informal complaint filed Jan 12, 2001).

B. The Structure of the Access Service Market

26. The commenters present two dramatically different views of the problem of CLEC access charges. IXC purchasers of CLEC access services contend that CLECs have tariffed switched access rates at unjust and unreasonable levels.[62] They assert that it is an anomaly for a "competitive" provider to enter a market by charging well in excess of the rate charged by the market's incumbent and that such entry could not be maintained in a competitive market.[63] The IXCs argue that high access charges allow CLECs unfairly to shift their operational expenses and their network build-out expenses to IXCs and, through them, to long distance ratepayers generally.[64] Moreover, IXC commenters complain that these unreasonable rates are unilaterally imposed through tariffs, rather than through negotiation with a willing purchaser.[65] Furthermore, the IXCs complain that many CLECs take the position that IXCs may not refuse CLEC access services.[66] Thus, the IXC commenters see themselves as unwilling consumers of the CLECs' access services.[67]

27. By contrast, CLECs assert that their rates are justified by their substantial network development costs and their significantly higher per-unit cost of providing service that arises from the smaller customer base over which they may spread their operational costs.[68] They argue that ILECs were for many years protected monopoly providers of local exchange and exchange access services; during that time, they funded the build-out of their networks through rates imposed on captive customers and through access rates that were dramatically higher than they are today.[69] Defending their filing of tariffs for access service, CLEC commenters assert that the

[62] AT&T Comments at 28 (numerous CLECs tariff rates at "supracompetitive" levels); Sprint Comments at 14-15; Cable & Wireless Comments at 2. *But see* MCI WorldCom Comments at 18 ("there is no evidence in the record to demonstrate that unreasonably high CLEC access charges are ubiquitous or even widespread").

[63] *See, e.g.,* Sprint Comments at 19 (CLECs "cannot expect to enter a market, of their own free will, as competitors and yet attempt to recover their start-up costs from customers").

[64] Sprint Comments at 16 ("The level of charges some CLECs are seeking to collect could easily undermine the basis for current long distance rates.").

[65] *See, e.g.,* AT&T Comments at 28.

[66] *See* AT&T Reply Comments at 31 (noting CLEC "claims that IXCs are obligated to pay CLECs' exorbitant access charges simply by virtue of the fact that their networks receive traffic from, or terminate traffic to, the CLECs' end users"); AT&T Public Notice Comments at 6 (citing to *Advamtel* case).

[67] AT&T Reply Comments at 31 ("[I]t is not technically feasible without time-consuming and costly development ... to identify and then selectively block calling over their networks from or to end users served by CLECs.").

[68] *See, e.g.,* ALTS Comments at 3-4; CCG Comments at 9 ("As brand new entities, CLECs have substantially higher costs and serve a smaller customer base than their ILEC counterparts."); Allegiance Comments at 13, 20; McLeod Comments at 3; RICA Comments at 15-16.

[69] *See, e.g.,* Focal Comments at 17 ("Incumbent LECs ... benefit from their historical monopolies and decades of rate of return regulation, and thus already have ubiquitous telecommunications networks in place.").

section 208 complaint process provides IXCs an adequate remedy against unjust and unreasonable rates.[70]

28. The Act and our rules require IXCs to pay the published rate for tariffed CLEC access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable.[71] It appears that certain CLECs have availed themselves of this rule and have refused to enter meaningful negotiations on access rates, choosing instead simply to file a tariff and bind IXCs receiving their access service to the rates therein.[72] CLEC use of this strategy raises questions about the extent to which CLECs truly are subject to competition in their provision of access service. The Commission has previously noted the unique difficulties presented by the case of terminating access, where the called party is the one that chooses the access provider, but it neither pays for terminating access service, nor does it pay for, or choose to place, the call.[73] It further complicates the case of terminating access that an IXC may have no prior relationship with a CLEC, but may incur access charges simply for delivering a call to the access provider's customer.[74] In these circumstances, providers of terminating access may be particularly insulated from the effects of competition in the market for access services. The party that actually chooses the terminating access provider does not also pay the provider's access charges and therefore has no incentive to select a provider with low rates.[75] Indeed, end users may have the incentive to choose a CLEC with the highest access rates because greater access revenues likely permit CLECs to offer lower rates to their end users.[76]

29. The record does not indicate that a significant number of CLECs charge markedly higher rates for terminating than they do for originating access. It thus appears that CLEC originating access service may also be subject to little competitive pressure, notwithstanding the fact that the IXCs typically have a relationship with the local exchange provider in order to be included on the LEC's list of presubscribed IXCs.

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[70] *See, e.g.*, Cox Comments at 3;

[71] *See Hyperion Order*, 12 FCC Rcd 8596, 8608-8611, ¶¶ 23-29 (1997). *Cf. Advamtel*, 118 F. Supp. 2d at 687 (concluding that parties are precluded from negotiating separate agreements that affect the rate for services once a tariff has been filed with the Commission).

[72] *See, e.g.* AT&T Safe Harbor Comments at 3; Allegiance Comments at 4 ("customers of a tariffed service are required to pay tariffed charges until they obtain a ruling in a Section 208 complaint proceeding that the tariffed charges are unlawful"); RCN Comments at 10-11.

[73] *See Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338.

[74] Toll free calling and casual calling (dial around, credit card, etc.) may also result in an IXC paying access charges despite the fact that there is no pre-existing relationship between an IXC and the calling party's access provider.

[75] *See Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338. *Cf.* AT&T Safe Harbor Comments at 2 ("recipient of a traditional long distance call does not pay for the cost of that call; hence, end users are indifferent to the terminating access rates of the CLEC they select as a service provider, and that carrier can raise terminating access rates without impairing demand for its local service").

[76] *See, e.g.*, Sprint Comments at 17 (suggesting that some CLECs may provide local service free of charge to customers that generate significant access traffic).

30. Sprint and AT&T persuasively characterize both the terminating and the originating access markets as consisting of a series of bottleneck monopolies over access to each individual end user.[77] Thus, once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.

31. On further consideration, it appears that the CLECs' ability to impose excessive access charges is attributable to two separate factors. First, although the end user chooses her access provider, she does not pay that provider's access charges. Rather, the access charges are paid by the caller's IXC, which has little practical means of affecting the caller's choice of access provider (and even less opportunity to affect the called party's choice of provider) and thus cannot easily avoid the expensive ones. Second, the Commission has interpreted section 254(g) to require IXCs geographically to average their rates and thereby to spread the cost of both originating and terminating access over all their end users. Consequently, IXCs have little or no ability to create incentives for their customers to choose CLECs with low access charges.[78] Since the IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs. Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider.

32. The Commission previously projected that, at least in the case of originating access service, IXCs would likely enter marketing alliances with LECs offering low-priced access service and would thereby be able to exert downward pressure on CLEC access rates.[79] The Commission even raised the prospect that IXCs would themselves choose to enter the local service market as a means of exerting downward pressure on terminating rates. However, neither of these eventualities has come to pass, at least not to an extent that has resulted in effective downward competitive pressure on CLEC access rates. We now acknowledge that the market for access services does not appear to be *structured* in a manner that allows competition to discipline rates.[80]

33. We are concerned that, in this environment, permitting CLECs to tariff any rate that they choose may allow some CLECs inappropriately to shift onto the long distance market in general a substantial portion of the CLECs' start-up and network build-out costs. Such cost shifting is inconsistent with the competitive market that we seek to encourage for access

[77] *See* Sprint Comments at 17-18; AT&T Safe Harbor Public Notice Comments at 2-3; NY PSC Comments at 2; Alaska Comments at 5; Wisconsin PSC Comments at 3-5; Sprint Reply Comments at 9-12.

[78] *See* AT&T Safe Harbor Comments at 2. *See also* 47 U.S.C. § 254(g).

[79] *Access Charge Reform Order*, 12 FCC Rcd at 16141.

[80] *See generally* J. Acton & S. Besen, *An Economic Analysis of CLEC Access Pricing*, Charles River Associates, Cambridge, MA, 1999; R. Crandall & L. Waverman, *Talk Is Cheap*, The Brookings Institution, Washington, DC 1995.

service.[81] Rather, it may promote economically inefficient entry into the local markets and may distort the long distance market. While we seek to promote competition among local-service providers, we also seek to eliminate from our rules opportunities for arbitrage and incentives for inefficient market entry.

34. We decline to conclude, in this order, that CLEC access rates, across the board, are unreasonable. Nevertheless, there is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates.[82] Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.

C. Tariff Benchmark Mechanism

35. We have previously sought comment on a variety of solutions to the problems connected with CLEC access charges, including mandatory detariffing of CLEC switched access services and setting a benchmark to constrain CLEC switched access charges.[83] A substantial majority of commenters, including CLECs, IXCs, and ILECs, strongly oppose the mandatory detariffing option.[84] They urge that it would cause both CLECs and IXCs to incur substantial and unnecessary negotiation costs simply to exchange traffic.[85] They further contend that these costs would create a significant barrier to entry for competitors seeking to enter the local market and would at least marginally drive up end-user rates for both local and long distance service.[86]

36. Apart from their opposition to mandatory detariffing, however, the two sides of the debate have been largely unable to agree about how CLECs should set rates for their switched access services. Certain IXCs assert that the Commission should immediately set CLEC tariffed rates at or near the rates of the ILEC operating in the CLEC's service territory.[87] On the other

[81] Parenthetically, we note that the drafters of the 1996 Act anticipated the high costs associated with facilities-based entry into local markets and, thus, adopted market opening provisions, such as section 251's mandate that incumbent local exchange carriers make available access to unbundled network elements, that promote market entry by competitors. 47 U.S.C. § 251(c).

[82] For instance, in *Total Tel. v. AT&T*, the Commission recently addressed a case in which a purportedly competitive access provider had tariffed rates that were in excess of $0.05 per minute. *Total Tel.*, FCC 01-84, File No. E-97-003.

[83] *Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338-49, ¶¶ 239-257; *Mandatory Detariffing Public Notice*, 15 FCC Rcd 10181; *Safe Harbor Public Notice*, 15 FCC Rcd 24102.

[84] *See, e.g.*, ALTS Comments at 35-36; RCN Comments at 12; AT&T Comments at 29-30; ALLTEL Comments at 7; USTA Comments at 24. *Accord* Sprint Comments at 25-27.

[85] *See, e.g.*, ALTS Comments at 35-36; AT&T Comments at 29-30; CCG Comments at 6; USTA Comments at 24.

[86] *See, e.g.*, CCG Comments at 6; CTSI Comments at 16-18.

[87] Sprint Comments at 20. *See also* AT&T Safe Harbor Comments at 15 ("the Commission should mandatorily detariff all CLEC switched access rates that exceed the ILECs' rates in the same service area"). *Cf.* WorldCom Safe Harbor Comments at 3-5.

hand, citing their high start-up costs and greater per-minute cost of providing service, many CLECs have argued that they should be permitted to tariff rates at whatever level, in their view, is necessary to recover their costs.[88]

37. We decline to immediately move CLEC access rates to the rate of the competing ILEC.[89] CLECs have, in the past, set their rates without having to conform to the regulatory standards imposed on ILECs, and this Commission has twice ruled, in essence, that a CLEC's rate is not per se unreasonable merely because it exceeds the ILEC rate.[90] Accordingly, we are reluctant to flash-cut CLEC access rates to the level of the competing ILEC; a more gradual transition is appropriate so that the affected carriers will have the opportunity to adjust their business models. On the other hand, we are equally reluctant to permit CLECs to continue to tariff the access rates they charge IXCs at the level they see fit, without any guidelines to ensure their reasonableness. We find persuasive IXC arguments that it is highly unusual for a competitor to enter a market at a price dramatically above the price charged by the incumbent, absent a differentiated service offering.

38. In analyzing the problems surrounding CLEC access charges, it is important to recognize that, in their provision of access services, competitive carriers actually serve two distinct customer groups. The first is the IXCs, which purchase access service as an input for the long distance service that they provide to their end-user customers. As we discuss above, IXCs are subject to the monopoly power that CLECs wield over access to their end users. However, an equally important group of customers for access services is the end users who benefit from the ability, provided by access service, to place and receive long distance calls. In regulating ILEC access rates, this Commission has recognized the benefit that end users receive from access service and has concluded that it justifies the ILECs' imposition of the subscriber line charge (SLC) on end users.[91] The noteworthy aspect of this second group of access consumers, or beneficiaries, is that, unlike IXCs, they have competitive alternatives in the market in which they purchase CLEC access service: In any market where a CLEC operates, there is, by definition, at least one alternative provider – the ILEC.

39. The notion of these two, parallel markets for access service sheds light on the dilemma presented by CLEC access charges. It leads us to conclude that, in keeping with their competitive, unregulated character, CLECs should be permitted to set the combined level of their access charges, for all the consumers of the service, as they please. If, as they contend, their per-unit costs are higher than those of the ILECs, we will not stand in the way of their recovering those costs. Given the unique nature of the market in which the IXCs purchase CLEC access, however, we conclude that it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access

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[88] *See, e.g.*, CCG Comments at 7-12; CoreComm Comments at 3-4; RCN Comments at 5 n.8.

[89] *See* Sprint Comments at 21 (advocating that we "set an absolute ceiling on what CLECs can charge IXCs"). *See also* WorldCom Safe Harbor Comments at 4-5; WorldCom Reply Comments at 20.

[90] *See Sprint Communications co. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000); *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).

[91] *See, e.g., CALLS Order*, 15 FCC Rcd at 13000, ¶ 95.

customers – and, through them, the long distance market generally. On the other hand, we continue to abstain entirely from regulating the market in which end-user customers purchase access service. Accordingly, CLECs remain free to recover from their end users any greater costs that they incur in providing either originating or terminating access services. When a CLEC attempts to recover additional amounts from its own end user, that customer receives correct price signals and can decide whether he should find an alternative provider for access (and likely local exchange) service. This approach brings market discipline and accurate price signals to bear on the end user's choice of access providers.

40. Under the regime we adopt in this order, CLECs will be restricted only in the manner that they recover their costs from those access-service consumers that have no competitive alternative. We implement this restriction on the CLEC's exercise of their monopoly power by establishing a benchmark level at which CLEC access rates will be conclusively presumed to be just and reasonable and at (or below) which they may therefore be tariffed. Above the benchmark, CLECs will be mandatorily detariffed. CLECs that seek to charge to IXCs rates that are in excess of this benchmark may do so, but only outside of the regulated tariff process. A substantial number of commenters on both sides of the issue have suggested this safe harbor approach.[92] Given the historical disagreement among CLECs and IXCs on this issue, we find their joint support for this solution to be particularly persuasive. In addition to enjoying their support, the benchmark approach has several virtues that recommend it.

41. First, a benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of "reasonableness." Historically, ILEC access charges have been the product of an extensive regulatory process by which an incumbent's costs are subject to detailed accounting requirements, divided into regulated and non-regulated portions, and separated between the interstate and intrastate jurisdictions. Once the regulated, interstate portion of an ILEC's costs is identified, our access charge rules specify in detail the rate structure under which an incumbent may recover those costs.[93] This process has yielded presumptively

[92] *See, e.g.*, WorldCom Safe Harbor Comments at 1-5; AT&T Safe Harbor Comments at 4-5; ALTS Safe Harbor Comments at 4-6; Minnesota CLEC Safe Harbor Comments at 2-6; CompTel Comments at 2-3; OPASTCO Safe Harbor Comments at 2. *But see* USTA Safe Harbor Comments at 4.

[93] First, an incumbent LEC must keep its books in accordance with Uniform System of Accounts set forth in Part 32 of the Commission rules. *See* 47 C.F.R. §§ 32.1 - 32.9000. Second, Part 64 of the Commission's rules divides an incumbent's costs between those associated with regulated telecommunications services and those associated with non-regulated activities. *See* 47 C.F.R. §§ 64.901 - 64.904. Third, our Part 36 separations rules determine the fraction of the incumbent LEC's regulated costs, expenses and investment that should be allocated to the interstate jurisdiction. *See* 47 C.F.R. §§ 36.1 - 36.741. After the total amount of regulated, interstate cost is identified, the access charge and price cap rules translate these interstate costs into charges for the specific interstate access services and rate elements. Part 69 specifies in detail the rate structure for recovering these costs. *See* 47 C.F.R. §§ 69.1 - 69.731. These rules tell the incumbent LECs the precise manner in which they may assess interstate access charges on interexchange carriers and end users. Additionally, the Commission regulates the rate levels incumbents may charge for their access services, requiring them to comply with either the rate-of-return or the price-cap regulations. *Compare* 47 C.F.R. §§ 65.1 - 65.830 (relating to rate of return that certain non-price-cap ILECs may earn on interstate access service) *with CALLS Order*, 15 FCC Rcd at 12962, ¶¶ 151-84 (adopting rate (continued....)

just and reasonable access rates for ILECs. Recently, the Commission has attempted to move away from such extensive regulation of ILECs. With the *CALLS Order*, we solved some of the most vexing problems relating to ILEC access rates, reducing the subsidies implicit in access rates and establishing target rates to which the participating LECs will move over the five years following the order. Given our attempts to reduce the regulatory burden on ILECs, we are especially reluctant to impose similar legacy regulation on new competitive carriers. We note that no CLEC has suggested that we adopt such a heavily regulatory approach to setting their access rates.[94]

42. Second, by permitting CLECs to file access tariffs at or below a benchmark rate, our interim approach continues to allow the carriers on both sides of the access transaction to enjoy the convenience of a tariffed service. As noted above, both IXCs and CLECs assert that their transaction costs would rise substantially if they were required to negotiate the terms on which they exchange access traffic.[95] Moreover, several commenters argue that the failure of some of these negotiations likely would lead to disruptions in the exchange of access traffic, which would, in turn, threaten the ubiquity of the public switched network.[96] We question whether the consequences of mandatory detariffing would be as drastic as some of the commenters contend.[97] Nevertheless, we recognize the attraction of a tariffed regime because it permits CLECs to file the terms on which they will provide service and to know that, absent some contrary, negotiated agreement, any IXC that receives access service is bound to pay the tariffed rates.[98] Similarly, IXCs will know that, whatever the source or destination of their access traffic, they will be assured a rate that either is within the benchmark zone of reasonableness or is one to which they have agreed in negotiations.

43. Third, adopting a benchmark for tariffed rates allows CLECs the flexibility to obtain additional revenues from alternative sources. They may obtain higher rates through negotiation. If a particular CLEC provides a superior quality of access service, or if it has a particularly desirable subscriber base, one or more IXCs may be willing to pay rates above the benchmark in order to receive that CLEC's switched access service. Similarly, CLECs retain the

(Continued from previous page)
level components for price-cap carriers). Finally, Part 61 requires incumbent LECs to publish their rates in tariffs, and the rules restrict how and when incumbents may change their rates. *See* 47 C.F.R. §§ 61.1 - 61.193.

[94] *See, e.g.*, ALTS Reply Comments at 6 ("CLECs are unanimous in rejecting any need for further rate regulation of their industry"). *See also* Cox Safe Harbor Reply Comments at 6 (noting difficulty of applying traditional ILEC regulation to CLECs).

[95] *See, e.g.*, ALTS Comments at 35-36; AT&T Comments at 29-30; ASCENT Detariffing Comments at 1-7.

[96] *See, e.g.*, Global Crossing Detariffing Comments at 7; Minnesota CLEC Detariffing Comments at 6; Time Warner Detariffing Comments at 7. *Cf.* Sprint Comments at 20.

[97] For example, we expect that stock contracts, broadly acceptable to both IXCs and CLECs, would quickly develop. Similarly, given all carriers' business incentives to maintain traffic flow, we question whether anything beyond minor customer inconvenience would develop. Moreover, the increased transaction costs of negotiation would likely be substantially offset by reduced regulatory and litigation costs associated with justifying tariffed rates.

[98] *See supra* note 71.

flexibility to charge their end users higher rates for the access service to which they subscribe. Here again, if the CLEC provides a superior product, the end user likely will be willing to pay for it; however, if a CLEC attempts to impose an unreasonable surcharge on its customer, the customer receives accurate price signals and may be motivated to find an alternative provider.

44. We conclude that the benchmark we adopt will address persistent concern over the reasonableness of CLEC access charges and will provide critical stability for both the long distance and exchange access markets. In structuring the benchmark mechanism, we have taken into account a broad variety of competing factors, including: (1) the need to constrain access rates with an eye toward continuing the downward trend in long distance prices, (2) the importance of having new entrants' rates move toward and ultimately meet those of market incumbents, (3) the need to avoid too severe of a disruption in the CLEC sector of the industry, and (4) the extreme difficulty of establishing a "reasonable" CLEC access rate given the historical lack of regulation on the process of CLEC ratemaking. We conclude that our benchmark system, with its conclusive presumption of reasonableness, provides the best solution to the difficult problems associated with how CLECs set their access charges. We are optimistic that it will serve as a reasonable response, pending our more complete review of intercarrier compensation issues,[99] to the many competing pressures and priorities that surround CLEC access charges.

D. Level and Structure of the Tariff Benchmark

45. Our orders addressing ILEC access charges have consistently stated our preference to rely on market forces as a means of reducing access charges. Thus, in setting the level of our benchmark, we seek, to the extent possible, to mimic the actions of a competitive marketplace, in which new entrants typically price their product at or below the level of the incumbent provider. We conclude that the benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area.[100] We do not, however, immediately set the benchmark rate at the competing ILEC rate because such a flash cut likely would be unduly detrimental to the competitive carriers that have not previously been held to the regulatory standards imposed on ILECs. Our benchmark mechanism, with certain exceptions, will permit CLECs initially to tariff rates for their switched access service of up to 2.5 cents per minute, or the rate charged by the competing incumbent LEC, whichever is higher.[101] For those carriers competing with ILECs that have tariffed rates below the benchmark (generally, the Bell operating companies), the benchmark rate will decline over the course of three years until it reaches the competing ILEC's rate. For at least one additional year, CLECs will be permitted to continue to tariff this rate, even if we decide to move other access traffic to a bill-and-keep regime. We also adopt rules to ensure

[99] *See Intercarrier Compensation NPRM*, FCC 01-132.

[100] We refer to this rate as the "competing ILEC rate."

[101] Appendix B sets out the new rule 61.46 that we adopt to effectuate the benchmark for CLEC access rates.

that no CLEC avails itself of our benchmark scheme to *increase* its access rates,[102] and we adopt a separate benchmark for certain firms operating in rural areas.[103]

46. In determining the initial level for the safe harbor rates which may be imposed by tariff, we use current CLEC rates as a starting point for analysis because, as noted above, we lack an established framework for translating CLEC costs into access rates.[104] Current CLEC rates provide a useful analytical tool since, in most instances, they were set unilaterally by the individual CLECs. Thus, there should be no concern that the current rates provide an inadequate return to the carrier that tariffed them. Additionally, we note that precedent exists for setting rates by some means other than reviewing the costs of each individual industry participant.[105]

47. Our understanding of current CLEC access rates is based on several sources. We have anecdotal information about a few CLECs' access charges through the complaint proceedings initiated at the Commission. At the time it filed its complaint against AT&T, MGC was charging slightly in excess of 8.5 cents per minute.[106] Similarly, in *U.S. TelePacific v. AT&T*[107] the CLEC was charging approximately 7.45 cents per minute for switched access. In addition, AT&T, WorldCom and Sprint submitted information regarding what they have been charged for CLEC access service and how many minutes of service this represents. The Association for Local Telecommunications Services (ALTS) also filed summary statistics on CLEC access rates based on a survey of its members. Each of these data sources has its limitations[108]; nonetheless, we believe that the information submitted by AT&T, WorldCom, and

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[102] *See infra* paragraph 57.

[103] *See infra* paragraphs 64-87.

[104] Moreover, CLEC commenters have not submitted, in this proceeding, any data to justify their rates. Rather, these commenters have relied upon generalized assertions that their rates are justified by higher costs.

[105] In the *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968), the Court noted that "administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties." Recognizing the need for "more expeditious administrative methods," the Court further stated that "rate-making agencies are not bound to the service of any single regulatory formula; they are permitted . . . 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Id.* at 776-77 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). *See also FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (agency is not required "to adhere rigidly to a cost-based determination of rates, much less to one that bases each producer's rates on his own costs" (internal quotation omitted)); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984); *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 309 (1963) ("Court has never held that the individual company cost-of-service method is a *sine qua non*" of rate regulation); *American Public Gas Association v. Federal Power Commission*, 576 F.2d 1016, 1037 (D.C. Cir. 1977) (approving economic modeling as basis for ratemaking). As noted elsewhere, we do not set rates in this order. We only limit the rates that CLECs may impose through the tariff system.

[106] *MGC v. AT&T*, 14 FCC Rcd at 11647, n.4.

[107] File No. EB-00-MD-010.

[108] For example, Sprint does not provide minute-of-use data for those CLECs that charge less than or equal to the corresponding ILEC rate. Similarly, AT&T and WorldCom appear not to have submitted *any* data for CLECs that charge less than or equal to the corresponding ILEC rate. Finally, the estimates submitted by ALTS are of (continued....)

Sprint, provides the best, most comprehensive information available on CLEC access rates. In particular, we believe that by analyzing the IXC data on actual amounts billed and actual minutes of use, we can calculate composite access rates and largely avoid the problems that arise from the fact that CLEC rate structures vary widely and that many rely, in part, on flat-rated, or distance-sensitive, charges.[109]

48. Taken together, the IXC submissions include usable data on switched access rates for over 70 CLECs. The carriers' submissions show a range of 0.4 cents to 9.5 cents per minute for CLEC-provided switched access service.[110] From the underlying, individual CLEC data, we are able to determine the average, weighted by minutes of use, for tariffed access rates.[111] Table 1 indicates that, while there is minor variation between the weighted averages for each IXC's data, they are notably similar. Indeed, given the wide *range* of tariffed CLEC rates, we conclude that these averages are similar enough to give us an accurate view of current tariffed CLEC access rates.

Table 1

DATA SOURCE	WEIGHTED AVERAGE
AT&T	4.33 cents/min
Sprint	3.48 cents/min
WorldCom	4.16 cents/min

49. This data provides some guidance for our choice of an initial benchmark level. It is important that the benchmark, though within this range, also move CLEC access charges appreciably closer to the competing ILEC rate. The record indicates that many CLECs have tariffed rates that are less than or equal to the competing ILEC rate, although these rates are not reflected in the usable data submitted by AT&T, WorldCom, and Sprint.[112] Indeed, AT&T

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questionable value, because they have not submitted the underlying data, they have not indicated whether they calculated a weighted or unweighted average, nor have they indicated how they selected the 32 CLECs in their sample from among their approximately 200 CLEC members.

[109] We consider the "composite rate" to be the amount billed for a given period divided by the minutes of use. Thus, flat rated elements or per mile charges are translated into a per minute rate for purposes of this analysis.

[110] Estimates for this range exclude outlying observations that appear to be clearly inaccurate. For example, certain data points yielded a composite per-minute access rate in excess of 25 cents.

[111] The averages are weighted by overall minutes of use. We were able to calculate weighted averages based on the data filed by AT&T, WorldCom, and Sprint.

[112] We note, for example, that Sprint submitted data on the amounts billed by CLECs that, according to Sprint, charge less than or equal to the ILEC rate. Sprint Safe Harbor Comments at Appendix 1. However, because Sprint has not provided the Commission with corresponding actual minutes of use data, it is impossible to calculate
(continued....)

asserts that over 80% of the CLECs from which it receives access bills charge rates at or below those of the competing ILEC.[113] Accordingly, setting the initial benchmark toward the lower end of the range appears to be justified. Based on our review of the universe and concentration of tariffed access rates being charged to these three IXCs, we conclude that – again, subject to certain exceptions that we discuss below – our safe harbor for CLEC tariffed access rates will begin at 2.5 cents. This rate is within the current range of rates, but represents an appreciable reduction in the tariffed rate for many CLECs.

50. We draw additional support for this initial benchmark level from a consensus solution submitted by parties on both sides of the present dispute. In comments to the *Safe Harbor Public Notice*, the Association for Local Telecommunications Services (ALTS) filed a proposed resolution, negotiated with WorldCom, suggesting, in relevant part, that a benchmark of 2.5 cents per minute for CLEC tariffed access rates would be a reasonable one in at least some markets.[114] WorldCom described the parties' proposal as a "good faith attempt to reach a compromise among competing interests" and stated that it was "consistent with sound public policy and merits serious consideration."[115] ALTS's web site states that it represents over "200 companies that build, own, and operate" competitive, facilities-based networks.[116] We note that many of the CLECs participating in this proceeding are listed as members on ALTS's web site. Accordingly, it appears that this rate is acceptable to a substantial number of CLECs, although it represents a significant reduction in access rates. While ALTS suggests a different timeframe for reducing the safe harbor limit over time, we find its support for the initial rate to be a fair indicator of its reasonableness. Similarly, we note that this rate is significantly below the average tariffed CLEC access rate, as reported by the IXC commenters. We conclude that this joint proposal offers a workable starting point for our benchmark, when combined with the rule that will prevent any CLEC from *increasing* its rates to the benchmark level and from entering new markets above the prevailing ILEC rate.[117]

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composite rates for these carriers, let alone confirm Sprint's contention that these carriers charge less than or equal to the ILEC rate.

[113] *See* AT&T Safe Harbor Comments at 7.

[114] ALTS Safe Harbor Comments at 4. *See also* ASCENT Safe Harbor Comments at 5 (ALTS proposal has "significant merit" and "may well form a viable basis for Commission action").

[115] WorldCom Safe Harbor Comments at 5. We note that the only portion of the ALTS proposal with which WorldCom specifically disagreed in its comments to the *Safe Harbor Public Notice* was the implementation schedule. *See id.* n.5. It is also noteworthy that ALTS and WorldCom personnel jointly met with Commission staff to discuss their proposal. *See* October 30, 2000 letter of Jonathan Canis, counsel for ALTS, to Magalie Salas, Secretary, FCC, CC Dkt. No. 96-262. Subsequently, WorldCom has also expressed support for a lower benchmark figure proposed by AT&T and NewSouth Communications. *See* March 22, 2001 letter of Donna Sorgi, WorldCom, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262.

[116] Association for Local Telecommunications Services, http://www.alts.org/frames/aboutalts.htm (visited Mar. 2, 2001).

[117] *See infra* paragraph 57. As additional support for the benchmark framework and the transition mechanism, if not the precise figure, that we adopt, we note that NewSouth Communications and AT&T have both recently expressed support for an initial benchmark figure of 1.2 cents per minute, transitioning to the ILEC rate within one year. *See* March 15, 2001 of Jake Jennings, NewSouth Communications, to Dorothy Attwood, Chief, Common
(continued....)

51. On the effective date of the rules we promulgate today, CLECs will be permitted (subject to a rural exemption discussed below) to tariff their access rates, for those areas where they have previously offered service,[118] at either the benchmark of 2.5 cents per minute, or the rate of the corresponding incumbent carrier in the study area of the relevant end-user customer, whichever is higher. By permitting CLECs to tariff their rates up to the level of the carrier with which they compete, we recognize that some competitive carriers may operate in areas served by incumbent LECs – often rural ones – that our rules already permit to charge access rates above those of the large price-cap ILECs.[119] If operation in these areas justifies higher access rates for the regulated incumbents, we conclude that it justifies equivalent rates for any competitor operating in the area.

52. Over time, our benchmark figure will decrease until it reaches the rate of the ILEC with which a CLEC competes. One year after the effective date of these rules, the benchmark rate will drop from 2.5 to 1.8 cents per minute, or the ILEC rate, whichever is higher. On the second anniversary of the rules' effective date, the rate will drop to 1.2 cents per minute, or the ILEC rate, whichever is higher.[120] Finally, three years after the rules become effective, the benchmark figure will drop to the switched access rate of the competing ILEC. It will remain at that level through the rule's fourth year. We conclude that such a transition period is appropriate because, as discussed above, we are concerned about the effects of a flash-cut to the ILEC rate.[121] Instead, we are persuaded that CLECs should be allowed an opportunity to adapt to the less tariff-dependent regulatory environment to which we move with this order. We adopt a three-year transition to the ILEC rate both because it appears to allow sufficient time for CLECs to adjust their business models and because it is consistent with several other Commission reform initiatives relating to inter-carrier compensation that are currently under way.[122]

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Carrier Bureau, CC Dkt. No. 96-262; March 16, 2001 letter of Patrick Merrick, AT&T, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262.

[118] *See infra* paragraph 58.

[119] *See Multi-Association Group (MAG) Plan For Regulation of Interstate Services of Non-Price Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Dkt. No. 00-256, Notice of Proposed Rulemaking, FCC 00-448, ¶ 5 (rel. Jan. 5, 2001).

[120] We note that this is the level that AT&T and NewSouth propose as the starting point for the benchmark. *See supra* note 117.

[121] *See supra* paragraph 37.

[122] We have chosen a three-year ramp-down period in the recently adopted order governing reciprocal compensation payments for traffic bound for internet service providers. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Dkt No. 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001). The transition period in this item should also bring CLEC rates down to the ILEC rate one year before ILEC rates are set to be reexamined in the *CALLS Order*. *See CALLS Order*, 15 FCC Rcd at 12977, ¶ 35. Lastly, the ramp-down period that we adopt today is consistent with the likely timeframe for the more far-reaching and general examination of inter-carrier compensation mechanisms that we initiated through another recent notice of proposed rulemaking. *See Intercarrier Compensation NPRM*, FCC 01-132 .

53. In order further to ease CLEC transition to the market paradigm that we adopt today, our rules permit CLECs to tariff, through the fourth year of the rule's effectiveness, a rate equivalent to the benchmark level established three years after the effective date of this order. As previously noted, the Commission is conducting a more general examination of inter-carrier compensation by way of a notice of proposed rulemaking. One of the options under serious consideration in that proceeding is a move to a bill-and-keep regime, under which carriers would recover their costs from end users, rather than from interconnecting carriers. Even if we choose that route in the inter-carrier compensation proceeding, the rules we adopt today would not mandate bill-and-keep for CLEC access tariffs until a full four years after the effective date of this order.

54. By moving CLEC tariffs to the "rate of the competing ILEC" we do not intend to restrict CLECs to tariffing solely the per-minute rate that a particular ILEC charges for its switched, interstate access service. As WorldCom notes, CLECs should not be "deprived of revenue streams available to the incumbent monopolists with which they compete."[123] Rather, by moving CLEC access tariffs to the competing ILEC rate, we intend to permit CLECs to receive revenues equivalent to those the ILECs receive *from IXCs*, whether they are expressed as per-minute or flat-rate charges. For example, CLECs shall be permitted to set their tariffed rates so that they receive revenues equivalent to those that the ILECs receive through the presubscribed interexchange carrier charge (PICC), to the extent that it survives in the wake of our *CALLS Order*.[124] This does not entitle CLECs to build into their tariffed per-minute access rates a component representing the subscriber line charge (SLC) that ILECs impose on their end users, or any other charges that ILECs recover from parties other than the IXCs to which they provide access service.

55. A number of CLEC commenters urge the Commission not to set the benchmark at "the ILEC rate" because they claim that CLECs structure their service offerings differently than ILECs.[125] We seek to preserve the flexibility which CLECs currently enjoy in setting their access rates. Thus, in contrast to our regulation of incumbent LECs, our benchmark rate for CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark. Rather it is based on a per-minute cap for all interstate switched access service charges. In this regard, there are certain basic services that make up interstate switched access service offered by most carriers. Switched access service typically entails: (1) a connection between the caller and the local switch, (2) a connection between the LEC switch and the serving wire center (often referred to as "interoffice transport"), and (3) an entrance facility which connects the serving wire center and the long distance company's point of presence. Using traditional ILEC nomenclature, it appears that most CLECs

[123] WorldCom Safe Harbor Comments at 2.

[124] In the *CALLS Order*, we eliminated the PICC for residential and single-line business users. *See CALLS Order* 15 FCC Rcd at 12991-13004, ¶¶76-104. For multi-line business users, we initially set it at $4.31 per line, subject to additional reductions that will ultimately eliminate it as well. *See id.* at 13004-07, ¶¶ 105-112.

[125] CLECs contend that they are using different technologies, different network architectures and different pricing plans that make comparison between CLEC and ILEC rates difficult. *See* BayRing Safe Harbor Comments at 3; Focal & Winstar Safe Harbor Reply Comments at 8.

seek compensation for the same basic elements, however precisely named: (1) common line charges; (2) local switching; and (3) transport.[126] The only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark. In addition, by permitting CLECs to decide whether to tariff within the safe harbor or to negotiate terms for their services, we allow CLECs additional flexibility in setting their rates and the amount that they receive for their access services.

56. We will apply the benchmark for both originating and terminating access charges. That is, it will apply to tariffs for both categories of service, including to toll-free, 8YY traffic, and will decline toward the rate of the competing ILEC for each category of service. We note, however, that shortly before the issuance of this order, AT&T raised questions regarding the application of our benchmark to originating 8YY traffic generated by CLEC customers.[127] Because these issues arose so late in the proceeding, and because of the sparse record on them, we decline to do as AT&T suggests and immediately detariff this category of CLEC services above the rate of the competing ILEC. Instead, in this order, we solicit comment on the issues AT&T has raised so that we may decide them on an adequately developed record.[128]

57. Our benchmark mechanism may create the possibility for carriers with lower rates to raise their rates to the benchmark. We seek to avoid this result, which could have the consequence of *increasing* the amount that IXCs pay for some CLECs' access service. This, in turn, would again allow these CLECs to shift a portion of their costs onto the long distance market generally. Accordingly, we further restrict the tariff benchmark that may be charged to a particular IXC by tariff to the lower of: (1) the 2.5 figure, declining as discussed above, or (2) the lowest rate that a CLEC has tariffed for access, during the 6 months immediately preceding the effective date of these rules. Any rate above this level (unless it is still below the competing ILEC's rate) will be conclusively deemed to be unreasonable in any proceeding challenging the rate.[129] By restricting CLECs to no more than the access rates they previously have chosen to

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[126] Thus, the safe harbor rate applies, but is not necessarily limited, to the following specific rate elements and their equivalents: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.

[127] *See* March 29, 2001 letter of Robert Quinn, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262; April 3, 2001 letter of Robert Quinn, AT&T, to Jeff Dygert, Assistant Chief, Common Carrier Bureau, CC Dkt. No. 96-262.

[128] *See infra* paragraphs 98-104. Late in this proceeding, Sprint argued that CLEC toll-free database query charges should also be subject to a tariff benchmark or should be detariffed above the rate of the competing ILEC. *See* April 6, 2001 letter of Richard Juhnke, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262. Sprint also mentioned this issue, but only in passing, in its comments to our *Safe Harbor Public Notice*. *See* Sprint Safe Harbor Reply Comments at 5. Given the dearth of record evidence on this issue, we decline at this time to impose by rule the limit on database query charges that Sprint proposes. We expect, however, that CLECs will not look to this category of tariffed charges to make up for access revenues that the benchmark system denies them.

[129] As set out in the regulations accompanying this order (*see* Appendix B), CLECs may thus tariff rates for switched access service that do not exceed the greater of:

A. The rate of the competing ILEC, or

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tariff, we minimize the opportunities for arbitrage that grow out of the rule we adopt today. Additionally, we expect that our benchmark rule will have no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs.[130] Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide.

58. We also find that it is prudent to permit CLECs to tariff the benchmark rate for their access services only in the markets where they have operations that are actually serving end-user customers on the effective date of these rules. As we note above, the historical ability of CLECs to tariff access rates well above the prevailing ILEC rate may have contributed to economically inefficient market entry by certain CLECs. We intend the declining benchmark scheme to wean competitive carriers off of their dependence on tariffed, supra-ILEC access rates without the disruption of a flash-cut to the prevailing market rate. We therefore think it important to ensure that this transitional mechanism serves that purpose, rather than presenting CLECs with the opportunity to enter additional markets in a potentially inefficient manner through reliance on tariffed access rates above those of the competing ILEC. Accordingly, we restrict the availability of the transitional benchmark rate to those metropolitan statistical areas (MSAs) in which CLECs are actually serving end users on the effective date of these rules. In MSAs where they begin serving end users *after* the effective date of these rules, we permit CLECs to tariff rates only equivalent to those of the competing ILEC; they will have to achieve rates above this level by negotiation.

59. We recognize that the benchmark we adopt may dramatically reduce the tariffed access rates and revenues of many CLECs, particularly as the benchmark levels transition down over time. We conclude, however, that this reduction is warranted. As discussed above, we are concerned that numerous CLECs have been entering the access-service market at rates well above the prevailing rate charged by the incumbent.[131] Moreover, we are troubled by indications that CLECs are using these high access rates to shift a substantial portion of their start-up costs onto the long distance market and thus onto many subscribers who have chosen an access provider with lower rates. As the CLEC industry's market share continues to grow, this burden would only increase, absent some constraint on rates. We have noted that CLECs' ability to charge rates above the incumbent's appears to be due largely to the configuration of the access-

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B. The lower of:

1. The presumptively reasonable benchmark of 2.5 cents per minute, declining as described in paragraph 52 above, or

2. The CLEC's lowest tariffed rate during the six months preceding the effective date of these rules.

[130] *See, e.g.*, *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300, 1301 (D.C. Cir. 1981) ("The *Sierra-Mobile* doctrine restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts.").

[131] We do not decide, in this order, whether those rates were reasonable at the time they were being charged. Rather, we conclude, on a prospective basis, that CLEC access rates will be deemed to be reasonable if they fall within the declining safe harbor that we have established.

service market and the geographical rate averaging required of the IXCs, both of which prevent market forces from disciplining rates. Our benchmark system will drive CLEC rates down toward the level charged by the ILECs, thereby bringing them toward the model of a competitive market, in which new entrants can successfully enter only at or below the prevailing market price. In so doing, the rules we adopt today reduce the opportunity for strategic use of the tariff system to impose unreasonable rates that are not subject to effective competition.

60. At the same time, we believe that our benchmark mechanism may actually result in increased access revenues for many CLECs. Many IXCs disputing the reasonableness of CLEC access rates have either been paying only the ILEC rate or have refused payment altogether. For these CLECs, our approach should provide greater certainty, and a more reliable stream of revenue, because we conclude that CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established. Accordingly, an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate. Similarly, because of the conclusive presumption of reasonableness that we will accord to tariffed rates at or below the benchmark, a CLEC with qualifying rates will not be subject to a section 208 complaint challenging its rates.

61. We expect that some IXC participants in this proceeding will find fault with our ruling because it does not immediately reduce CLEC access charges to the rates charged by incumbent LECs. It is true that, for the three-year phase-in period, many tariffed CLEC access rates will continue to exceed the prevailing market price charged by the ILEC. However, by limiting tariffed rates to our benchmark, we have immediately provided IXCs with relief from the substantially higher rates that many CLECs have been tariffing. In addition to the immediate relief on access charges that the benchmark mechanism affords IXCs, it also ensures that CLEC access rates will continue to decline until they reach the level of the ILEC rates. In setting the benchmark, we have adopted, on a prospective basis and over the long run, the IXCs' argument that the reasonable rate for CLEC access service is the rate that the ILECs are charging for similar service in the market. We decline, however, immediately to drop the CLEC rate to that point.

62. This type of transitional mechanism is vitally important to avoid too great of a dislocation in the CLEC segment of the industry. As noted above, the Commission has taken a broad variety of steps to ensure the development of local competition in keeping with the explicit goals of the 1996 Act. Avoiding unnecessary damage to this growing competition, as likely would result from an immediate transition to the ILEC rate, is consistent with our approach in other proceedings, such as the reform of reciprocal compensation that we recently adopted, in which we have sought to reduce the opportunity for regulatory arbitrage but have nevertheless provided a transition mechanism to prevent too great of a revenue shock to a particular group of carriers.[132] This transition period is necessary to permit CLECs to adjust their business plans and

[132] *See Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131. *See also Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15,982, 16002, FCC 97-158, para. 46 (1997) ("we are concerned that any attempt to move immediately to competitive prices for [certain ILEC access] services would require dramatic cuts in access charges for some carriers. Such an action could result in a substantial decrease in (continued....)

obtain alternative sources for the substantial revenues of which the benchmark will deprive them – revenues on which they have previously relied in formulating their business plans because they were not held to the regulatory standards imposed on ILECs.

63. Again, we emphasize that we adopt this benchmark approach on an *interim* basis. Concurrent with our adoption of this order, we initiate a proceeding in which we will broadly examine various categories of existing intercarrier compensation regimes and seek comment on whether these existing rules lead to efficient usage of, and investment in, network infrastructure, or to the efficient development of competition.[133] In that proceeding, we seek comment on whether alternative rules for access charges might limit the ability of LECs, including CLECs, to exercise market power in their provision of access service.

E. Safe Harbor Rates for Rural CLECs

64. Limiting CLECs to the higher of the benchmark rate or the access rate of its ILEC competitor could prove rather harsh for some of the small number of CLECs that operate in rural areas.[134] The difficulty would likely arise for those CLECs that operate in a rural area served by a price-cap incumbent with state-wide operations. Our rules require such ILECs to geographically average their access rates.[135] This regulatory requirement causes these "non-rural ILECs" effectively to use their low-cost, urban and suburban operations to subsidize their higher cost, rural operations, with the effect that their state-wide averaged access rates recover only a portion of the ILEC's regulated costs for providing access service to the rural portions of its study area. During the course of this proceeding, we became concerned that tying the access rates of rural CLECs to those of such non-rural ILECs could unfairly disadvantage CLECs that lacked urban operations with which they could similarly subsidize their service to rural areas. Accordingly, we sought comment on whether the phenomenon of the non-rural ILEC justified the creation of a "rural exemption" to our benchmark scheme and, if so, how that exemption should be structured.[136]

1. Whether to Create a Rural Exemption

65. We conclude that the record supports the creation of a rural exemption to permit rural CLECs competing with non-rural ILECs to charge access rates above those charged by the competing ILEC. First, we note that such a device is consistent with the Commission's obligations, under section 254(d)(3) of the Act and section 706 of the 1996 Act, to encourage the

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revenue for incumbent LECs, which could prove highly disruptive to business operations, even when new explicit universal support mechanisms are taken into account.").

[133] *See Intercarrier Compensation NPRM*, FCC 01-132.

[134] *See, e.g.*, ALTS Safe Harbor Comments at 5; CTSI Safe Harbor Comments at 9-11; Minnesota CLEC Safe Harbor Comments at 2-7; RICA Safe Harbor Comments at 4-9.

[135] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report & Order, 5 FCC Rcd 6786, 6788 (1990); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 866 (1995).

[136] *Safe Harbor Public Notice*, 15 FCC Rcd 24102, ¶¶ 5-7.

deployment to rural areas of the infrastructure necessary to support advanced telecommunications services and of the services themselves.[137] The record indicates that CLECs often are more likely to deploy in rural areas the new facilities capable of supporting advanced calling features and advanced telecommunications services than are non-rural ILECs, which are more likely first to deploy such facilities in their more concentrated, urban markets.[138] Given the role that CLECs appear likely to play in bringing the benefits of new technologies to rural areas, we are reluctant to limit unnecessarily their spread by restricting them to the access rates of non-rural ILECs.

66. We are persuaded by the CLEC comments indicating that they experience much higher costs, particularly loop costs, when serving a rural area with a diffuse customer base than they do when serving a more concentrated urban or suburban area.[139] The CLECs argue that, lacking the lower-cost urban operations that non-rural ILECs can use to subsidize their rural operations, the CLECs should be permitted to charge more for access service, as do the small rural incumbents that charge the National Exchange Carrier Association (NECA) schedule rates.[140] We note in this regard that a rural exemption will also create parity between the rural CLECs competing with NECA carriers and those competing with non-rural ILECs.

67. In adopting the rural exemption, we reject the characterization of the exemption as an implicit subsidy of rural CLEC operations.[141] It is true that an exemption scheme will permit rural CLECs to charge IXCs more for access to their end-user customers than was charged by the non-rural ILECs from whom the CLECs captured their customers. But that does not necessarily justify limiting the rural CLEC to the access rates of the non-rural ILEC. The same increase in access rates would occur if, rather than entering an area as a competitive carrier, a small local-service provider were to purchase a rural exchange and thus become the rural ILEC serving the end users in that exchange.[142] In that event, the IXC's cost for access to the exchange's end users

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[137] *See* 47 U.S.C. § 254(d)(3); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153, (1996) (reproduced in the notes under 47 U.S.C. § 157).

[138] *See e.g.*, RICA Safe Harbor Comments at 2.

[139] *Cf.* RICA Safe Harbor Reply comments at 7.

[140] *See* Minnesota CLEC Safe Harbor Reply Comments at 2; NTCA Safe Harbor Comments at 4-5; BayRing Safe Harbor Comments at 23; BayRing Safe Harbor Reply Comments at 3-4. The National Exchange Carrier Association is a non-stock, not-for-profit association that the FCC established in 1983, *inter alia*, to administer its Access Charge Plan and the associated pools and tariffs. *See* 47 C.F.R. §§ 69.601, *et seq.* NECA files interstate access tariffs for primarily small, rural and high-cost ILECs that participate in its common line or traffic-sensitive pools. NECA has over one thousand members that are either "cost" or "average schedule" companies. Cost companies submit cost studies to NECA; these studies form the basis for the cost companies' settlements with the NECA pools. For average schedule companies, NECA collects cost information from selected representative members on a periodic basis. It uses this information to generate average schedule rates. These rates, rather than the actual costs of the individual average schedule companies, govern the settlements of these average schedule companies with the NECA pools. The data from the cost companies and the average schedule companies together provide the support for the development of the NECA tariffs.

[141] *See* AT&T Safe Harbor Reply Comments at 12-13.

[142] *Cf.* RICA Safe Harbor Reply Comments at 7. *See also* OPASTCO Safe Harbor Comments at 4 (many rural ILECs pursue an "edge-out" strategy, moving into territory of adjacent ILEC as competitor; arguing that, since (continued….)

would also increase, as the new ILEC likely would charge either NECA schedule rates or conduct a cost study to support its own access rates, and our rules would permit either outcome. This analysis leads us to conclude that the exemption we adopt today is not properly viewed as an implicit subsidy of rural CLEC operations. Instead, it merely deprives IXCs of the implicit subsidy for access to certain rural customers that has arisen from the fact that non-rural ILECs average their access rates across their state-wide study areas.

68. Our level of comfort in creating a rural exemption is markedly increased by the fact that the record indicates it likely will apply to a small number of carriers serving a tiny portion of the nation's access lines. The Rural Independent Competitive Alliance (RICA) asserts that, fewer than 100,000 access lines are served by carriers falling in the definition that it proffers for a rural CLEC.[143] This number is entirely overwhelmed by the approximately 192 million access lines reported by the Commission in its last report on local telephone competition.[144] Indeed, this figure for rural CLECs' customers amounts to substantially less than one percent of the 12.7 million lines served by CLECs.[145] We acknowledge that the definition for a rural CLEC that we adopt below is somewhat broader than that proposed by RICA.[146] It nevertheless appears likely to encompass only a small number of the overall total of CLEC end users.

69. We reject AT&T's argument that CLECs must rely solely on the *CALLS Order*'s interstate access support when entering the territories of non-rural ILECs. The *CALLS Order*'s $650 million portable universal service support mechanism represented the amount necessary to compensate participating ILECs for the subsidies that the order removed from their access revenues. This interstate access support mechanism is portable, but that does not necessarily indicate that it fully reflects the costs (above those recovered through ILEC access rates) that a rural CLEC would encounter in serving customers in the high-cost areas for which the subsidy is available. For example, we note that a CLEC entering the territory of a non-rural ILEC likely would not enjoy the economies of scope and scale that the ILEC does in the same territory.

70. We are also skeptical of AT&T's assertions about the incentives that would flow from a rural exemption. First, AT&T argues that the exemption would "create perverse incentives for uneconomic competitive entry by CLECs in any 'rural' areas in which it might be applicable."[147] It appears from the record that both AT&T and Sprint have routinely been paying

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these carriers charge NECA rates in their home territories, they should also be permitted to do so in areas they enter competitively).

143 RICA Safe Harbor Comments at 17.

144 *See* Industry Analysis Division, FCC, *Local Telephone Competition: Status as of June 30, 2000* at 1 (rel. Dec. 4, 2000) (*Local Telephone Competition*).

145 *See id.*

146 Below, we define rural areas as those falling outside of (1) any incorporated place of 50,000 inhabitants or more or (2) an urbanized area defined by the Census Bureau. *See infra* paragraph 76. RICA, on the other hand, proposes to include within the first portion of the definition only incorporated places of 20,000 inhabitants or more. *See* RICA Safe Harbor Comments at 6.

147 AT&T Safe Harbor Comments at 13.

for CLEC access billed at the rate charged by the competing incumbent. If AT&T were accurate in its projection about higher access rates spurring a rash of uneconomic market entry in rural areas, such uneconomic entry should already have occurred in the territories of the rural incumbent carriers that charge the higher NECA rates. However, the record fails to indicate such a trend. Additionally, we note WorldCom's assertion that geographically variable rates will create the incentive for CLECs to make it appear, through "foreign exchange type offerings," as if their end users were located in rural areas when they are not.[148] Here again, it appears that this incentive already has existed for any CLECs that choose to compete with NECA carriers and that consequently would receive the equivalent of NECA rates from Sprint and AT&T. However, the record discloses no significant attempt by CLECs to collect high charges for access to end users that are actually located outside of the NECA carriers' territory.

71. We are similarly unpersuaded by AT&T's argument that a rural exemption will cause a proliferation of chat line providers in the territories served by rural CLECs. We recognize that AT&T has alleged that, in certain circumstances, it violates the Act for a LEC with relatively high access rates (such as a NECA carrier) to serve a chat line provider as a means of increasing the LEC's access traffic.[149] It appears that the conduct that AT&T challenges in these proceedings grows out of the arbitrage opportunity created by the higher access rates charged by rural NECA carriers. However, we are skeptical that the rural exemption that we create today will add markedly to AT&T's problem in this regard. The FCC recently reported that non-price cap incumbent carriers served in excess of 12 million lines in the U.S.[150] The bulk of these carriers either charge NECA access rates or something similar. Adding less than one percent to the number of rural lines eligible for higher access rates seems highly unlikely to increase dramatically the arbitrage opportunities involving chat line providers.

72. Furthermore, as we have noted previously, the mechanism that we implement today serves as only a transitional solution to a portion of the much larger question of inter-carrier compensation. We are examining the broader questions of inter-carrier compensation through a notice of proposed rulemaking. Additionally, the Commission currently has before it the Multi-Association Group (MAG) Plan, which has as one of its goals the reduction of rural ILECs' access charges.[151] Below, we tie the rates for rural CLECs to the NECA rates charged by rural ILECs. Accordingly, as our access reform efforts for rate-of-return carriers and our other efforts on inter-carrier compensation bring down the access rates of rural ILECs, any opportunities for arbitrage growing out of the exemption for rural CLECs will also diminish.

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[148] WorldCom Safe Harbor Reply Comments at 4.

[149] *See* AT&T Safe Harbor Reply Comments at 16. AT&T has raised these allegations in complaint proceedings that remain pending at the Commission. Our discussion of the issue presented in these proceedings should not be interpreted as prejudging them in any way.

[150] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. Table 8.2 (Dec. 2000).

[151] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Notice of Proposed Rulemaking, FCC 00-448 (rel. Jan. 5, 2001).

73. We thus conclude that the record supports the creation of a rural exemption to the benchmark scheme that we adopt for CLEC access charges. Under this exemption, a CLEC that is operating in a rural area, as defined below, and that is competing against a non-rural ILEC may tariff access rates equivalent to those of NECA carriers. Below we discuss more precisely the CLECs to which this exemption will be available and the access rates that they may impose by tariff.

2. Carriers Eligible for Rural Exemption

74. In response to our public notice inquiring about the potential of the rural exemption from our benchmark scheme, we received a variety of suggested structures. CTSI and BayRing assert that the exemption's higher access rates should be available on an end-user-by-end-user basis for all customers living outside of density zone 1 of the nation's top 50 metropolitan statistical areas (MSAs), a standard that would open the exemption to a far broader range of carriers than we think is necessary to promote competitive entrants in truly rural areas.[152] As Sprint notes, this definition of rural would "include metropolitan areas having populations of up to 958,000, and would include such sizable cities as Honolulu, Tucson, Tulsa, Omaha, and Albuquerque."[153] At the other extreme, Sprint argues that the exemption should be available to a CLEC that serves both business and residential customers and that operates exclusively outside of any MSA.[154] As some commenters assert, this definition may be overly exclusive because MSAs typically include the full area of the counties contiguous with the central population center, and, especially in the case of larger counties, may therefore include substantial areas that are undeniably rural.

75. Administrative simplicity is an important consideration in our choice of a way to define rural CLECs. Thus, we conclude that the availability of the exemption (and the higher access rates that come with it) should be determined based on the CLEC's entire service area, not on a subscriber-by-subscriber basis. Similarly, we are concerned that the definition rely on objectively available information that will not require extensive calculation or analysis by either carriers or this Commission. For example, many comments suggest that, at bottom, density is the factor that should determine whether an area qualifies as rural; it is the factor that reflects a LEC's loop lengths and, not surprisingly, the number of potential subscribers in an area. The factors of longer loop length and lower concentration of potential subscribers are, in turn, what motivate us to permit higher access rates in rural areas. However, our concern with objectivity leads us to conclude that rural CLECs should not be defined explicitly by the population density in their service areas because density figures for the irregular areas likely to be served by CLECs – areas that typically will not correspond to state or municipal boundaries or to Census Bureau divisions – are not readily available.

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[152] BayRing Safe Harbor Comments at 21-22; CTXI Safe Harbor Comments at 11-14. The Office of Management and Budget defines metropolitan statistical areas. Essentially, they encompass cities with a population of more than 50,000 and all of the adjoining counties. *See* Alternative Approaches to Defining Metropolitan and Nonmetropolitan Areas, 63 Fed. Reg. 70525, 70526 (OMB 1998). Currently, there are 258 MSAs in the country.

[153] Sprint Safe Harbor Reply Comments at 7.

[154] *See* October 11, 2000 letter of Richard Juhnke, Sprint Corp., to Magalie Salas, Secretary, FCC, CC Dkt. No. 96-262.

76. We conclude that the rural exemption to our benchmark limitation on access charges will be available for a CLEC competing with a non-rural ILEC, where no portion of the CLEC's service area falls within: (1) any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or (2) an urbanized area, as defined by the Census Bureau.[155] Thus, if any portion of a CLEC's access traffic originates from or terminates to end users located within either of these two types of areas, the carrier will be ineligible for the rural exemption to our benchmark rule. Relying on information that is readily and publicly available, this definition excludes from the exemption those CLECs operating within reasonably dense areas that are not typically considered to be rural. It does not, however, exclude from eligibility entire counties that border high population areas, as would a definition based on MSAs.

77. Sprint has raised the issue of how best to ensure that the rural exemption does not create the potential for abuse and that it is restricted to CLECs that are serving rural end users.[156] Thus, Sprint is concerned about the potential for competitive carriers, with some qualifying end users, creating two separate operating entities so that the one serving rural end users could tariff the higher access rate permitted under the exemption. While we want to forestall that strategy for exploiting our rule, we also realize that certain incumbents with urban (or non-rural) operations may choose to enter adjacent rural markets as a competitive carrier. To the extent that such carriers provide the benefit of competition in rural markets, their non-qualifying incumbent operations should not operate entirely to deny them the benefit of the rural exemption. Accordingly, we decline Sprint's invitation to examine all of the subsidiary operations of a holding company in order to determine the applicability of the rural exemption. We expect that we will be able to address, on a case-by-case basis, the improper exploitation of our rule – such as a competitive carrier's splitting itself into two subsidiaries to qualify, in part, for the exemption rates where it would not otherwise do so.

78. Our definition for rural CLECs closely resembles the first major division of the Act's definition for rural telephone companies.[157] It departs from the remaining three major divisions of the definition either because they would be administratively burdensome, or because they would be overly inclusive or irrational when applied solely to CLECs.[158] Our definition

[155] An urbanized area "is a continuously built-up area with a population of 50,000 or more. It comprises one or more places – central place(s) – and the adjacent densely settled surrounding area – urban fringe – consisting of other places and nonplace territory." U.S. Bureau of the Census, GEOGRAPHIC AREAS REFERENCE MANUAL at 12-1; available at http://www.census.gov/ftp/pub/geo/www/GARM/Ch12GARM.pdf (visited February 7, 2001). *See also id.* at 12-7 to 12-8 (further discussion of criteria for defining urbanized areas). 405 urbanized areas were defined by the time of the 1990 census. *Id.* at 12-5.

[156] *See* April 6, 2001 letter of Richard Juhnke, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262.

[157] *See* 47 U.S.C. § 153(37)(A).

[158] We do not adopt the portion of the Act's definition that classifies as rural those companies providing service to "fewer than 50,000 access lines," 47 U.S.C. §153(37)(B), because it would permit a CLEC serving 45,000 access lines in downtown Manhattan or Los Angeles to qualify as rural. Because CLECs may not have assigned geographic areas in which they must offer service to all subscribers, the portion of the definition relating to carriers serving study areas with fewer than 100,000 access lines, *id.* § 153(37)(C), simply does not apply to CLECs. Finally, because we decline, for reasons of administrative simplicity, to get into a subscriber-by-subscriber analysis (continued….)

adopts 50,000, rather than 10,000, as the population cut-off for incorporated places because we are concerned that, without the statute's remaining three portions of the definition as a way for a company to attain rural status, the 10,000-person threshold would be unduly restrictive and deny the exemption to companies operating in areas that would generally be viewed as rural.

79. It is also necessary to discuss briefly the type of carrier with which a CLEC must be competing in order to qualify for the rural exemption. Our intent is that this exemption will permit a CLEC to tariff access rates above the competing ILEC's only when the competing ILEC has broad-based operations that include concentrated, urban areas that allow it to subsidize its rural operations and therefore charge an artificially low rate for access to its rural customers. We conclude that the most effective and objective means of accomplishing this is to allow the rural exemption only to those CLECs that are competing with price-cap ILECs that do not qualify as "rural telephone companies" under the Act's definition.[159] Those CLECs competing with carriers that qualify as rural under the Act's definition are excluded from the rural exemption and are therefore limited, under the rule we announce above, to tariffing access rates equal only to those of the competing ILEC.

3. Rate for Exemption Carriers

80. The final question with respect to the rural exemption is what the access service benchmark is for those carriers that qualify. We adopt the NECA tariff for switched access service as the standard that is the most appropriately reflective of the considerations that should go into pricing the access service of rural CLECs. Accordingly, qualifying rural CLECs may tariff rates at the level of those in the NECA access tariff, assuming the highest rate band for local switching and the transport interconnection charge, *minus* the tariff's carrier common line (CCL) charge if the competing ILEC is subject to our *CALLS Order*. Above this benchmark, rural CLECs will be mandatorily detariffed in their provision of access services.

81. We adopt the NECA access rate because it is tariffed on a regular basis and is routinely updated to reflect factors relevant to pricing rural carriers' access service. We choose the highest rate bands for the two variable rate elements because the opportunity to tariff those rates will most effectively spur the development of local-service competition in the nation's rural markets and because the burden created by choosing the highest rate will be relatively minor, owing to the small number of carriers involved. We deny rural CLECs the NECA tariff's CCL charge when they compete with a *CALLS* ILEC because the price-cap LECs' CCL charge has been largely eliminated through implementation of higher subscriber line charge (SLC) caps and the multi-line business PICC. CLECs competing with *CALLS* ILECs are free to build into their end-user rates a component approximately equivalent to (or slightly below) the ILEC's SLC, as well as assessing IXCs a multi-line business PICC. These potential revenue sources obviate the need for a CCL charge, which NECA carriers use to recover loop costs that cannot be recovered because of their lower SLC caps and the absence of PICCs.

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of where a CLEC's end-user customers are located, we decline to adopt that portion of the Act's definition that defines as rural those companies with less than 15 percent of their access lines within a community of more than 50,000 people. *Id.* § 153(37)(D).

[159] 47 U.S.C. § 153(37).

F. Forbearance Analysis for Rates Above the Benchmark

82. As previously indicated, we conclude that, a CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark. During the pendency of these negotiations, or to the extent the parties cannot agree, the CLEC may charge the IXC only the benchmark rate. In order to implement this approach, we adopt mandatory detariffing for access rates in excess of the benchmark. That is, we exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark.[160]

83. Section 10 of the Act requires, *inter alia*, that the Commission forbear from applying any regulation or provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain statutory conditions are satisfied.[161] Because section 10 permits us to exercise our forbearance

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[160] *See* 47 U.S.C. § 160 (forbearance authority); 47 C.F.R. Part 61 (tariff regulations). As modified by the *Hyperion Order*, our tariff rules currently subject CLECs to permissive detariffing and set no pre-determined limits on the level of charges that CLECs may establish by tariff. *See supra* paragraph 12 (discussing *Hyperion Order*). We note that the law is somewhat unclear on which section of the Act requires or permits the filing of interstate access tariffs. In *Lincoln Telephone & Telegraph Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981), the Court of Appeals for the D.C. Circuit stated in dicta that access providers qualified as "connecting carriers" and were therefore exempt from the tariff-filing requirements of section 203(a). Rather, the court opined, the Commission could "exercise the residual authority" of section 4(i) to require tariffing of access services. *Id.* at 1109. In contrast, the court in *Advamtel v. AT&T* appears to have assumed that section 203 supported the tariffing of interstate access services. *See* 118 F. Supp. 2d at 683-84, 688.

[161] 47 U.S.C. § 160. Section 10(a) provides that:

> (a) REGULATORY FLEXIBILITY. – Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its geographic markets, if the Commission determines that –
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, form or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest."

47 U.S.C. § 160(a). Section 10(b) further provides:

> (b) COMPETITIVE EFFECT TO BE WEIGHED. -- In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

47 U.S.C. § 160(b).

authority with respect to classes of services, we conduct a forbearance analysis only for those CLEC interstate access services for which the aggregate charges exceed our benchmark. For this class of services, we conclude that the section 10 forbearance criteria are satisfied; accordingly, we must take action pursuant to the terms of this statute.

84. Under the first criterion for forbearance, we examine whether our tariff filing requirements for CLEC interstate access services priced above the benchmark are necessary to ensure that rates for these services are just and reasonable and not unreasonably discriminatory.[162] We conclude they are not. As noted above, CLECs are positioned to wield market power with respect to access service. Requiring CLECs to negotiate with their IXC customers in order to obtain access rates above the benchmark will limit the CLECs' ability to exercise this market power and unilaterally impose rates above the level that we have found to be presumptively reasonable.

85. We are not persuaded by CLEC commenters that contend they will be unable to negotiate agreements with IXCs because IXCs wield significant market power in the purchase of access services. We find these claims of IXC monopsony power unsupported in the record. We note that three major IXCs are purchasers in the market for access services, and numerous smaller players also purchase LEC access services. Moreover, we note that our tariff rules were historically intended to protect purchasers of services from monopoly providers, not to protect sellers from monopsony purchasing power. We conclude that other remedies, like those under the antitrust laws, are available to protect CLECs from the exploitation of any monopsony power that IXCs may possess.[163]

86. Under the second forbearance criterion, we must determine whether tariffing of CLEC access charges above the benchmark is necessary to protect consumers.[164] Such tariffing is not necessary to ensure that consumer rates are just and reasonable. To the contrary, requiring negotiation of access rates above the benchmark will provide greater assurance that the rates are just and reasonable and will likely prevent CLECs from using long distance ratepayers to subsidize their operational and build-out expenses. It is possible that the reduction of CLEC access revenue caused by the benchmark scheme will increase the rates CLECs charge their end users. However, all CLEC end users have competitive alternative service providers, in the form of regulated incumbents. We are therefore not concerned that any increase in CLEC end-user rates will unduly harm consumers. To the extent that this provision requires us to examine the effect on the IXC consumers of CLEC access services, mandatory detariffing likely will protect that group by removing the CLEC's ability unilaterally to impose excessive rates through the tariff process.

87. The third forbearance criterion requires that we determine whether mandatory detariffing of CLEC access services priced above the benchmark is consistent with the public

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[162] 47 U.S.C. § 160(a)(1).

[163] *See, e.g., United States v. Griffith*, 334 U.S. 100, 108 (1948); *Sunshine Cellular v. Vanguard Cellular Sys.*, 810 F.Supp. 486, 493-94 (S.D.N.Y. 1992) (denying motion to dismiss monopsony claim with respect to cellular phone roaming services).

[164] 47 U.S.C. § 160(a)(2).

interest and, in particular, whether it will promote competitive market conditions.[165] We conclude, as discussed above, that adopting mandatory detariffing for access rates in excess of the safe harbor limit will subject to negotiation between two willing parties any access services offered at a rate above the benchmark. The negotiation-driven approach that we adopt will provide a better mechanism for IXCs to control costs, since they will not be subject to tariffs with unilaterally established rates at excessive levels. In addition, our benchmark system, with its presumption that qualifying rates are reasonable, will provide greater certainty for CLECs that they will receive full compensation for the access services that they provide. By limiting a CLEC's ability to shift its start-up costs onto the long-distance market, our benchmark approach will restrict market entry to the efficient providers. Accordingly, mandatory detariffing of CLEC access services above the benchmark fulfills all three of the criteria for forbearance.

IV. INTERCONNECTION OBLIGATIONS

88. Although we have created a safe harbor for CLEC access rates, within which they will be presumed to be just and reasonable, the question remains of whether and under what circumstances an IXC can decline to provide service to the end users of a CLEC. In this proceeding, we sought comment on whether either section 201(a) or section 251(a) prohibit an IXC from declining to serve the customers of a CLEC because the IXC believes that the CLEC's access rates are too high. We also sought comment on whether an IXC must first obtain section 214 approval from the Commission before terminating service to CLEC customers.

89. Below, we conclude that section 201(a)'s requirement that a carrier provide communications service upon reasonable request obligates IXCs to serve the end users of a CLEC that is charging rates at or below the benchmark when the IXC is also serving the customers of other LECs in the same geographic area. We are optimistic that our conclusions in this regard will maintain the benefits of a seamless, interconnected public telephone network. Given the structure of the rules that we adopt, we need not address the applicability of section 214.

A. Interconnection and Sections 201 and 251

90. Section 201(a) of the Communications Act states that it is "the duty of every common carrier engaged in interstate or foreign communication . . . to furnish such communication service upon reasonable request therefor."[166] It also requires that common carriers establish physical connection with other carriers where, after the opportunity for a hearing, the Commission has found such action "necessary or desirable in the public interest."[167]

[165] 47 U.S.C. § 160(b).

[166] 47 U.S.C. § 201(a).

[167] Section 201(a) states –

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish

(continued....)

Similarly, section 251(a)(1) of the Communications Act requires all telecommunications carriers to interconnect directly or indirectly with each other.[168]

91. CLECs contend that sections 201(a) and 251(a)(1) require IXCs to accept all originating, and deliver all terminating, access traffic and to comply with all reasonable requests for interconnection.[169] IXCs, on the other hand, contend that a carrier's decision whether to interconnect is a matter of business judgment that is not subject to section 201(a).[170] They further argue that section 251(a)(1) only obligates a carrier physically to interconnect with the facilities of other carriers and does not require the acceptance or delivery of access traffic.[171]

92. We are generally persuaded by the IXCs' arguments. Sections 201(a) and 251(a)(1) do not expressly require IXCs to accept traffic from, and terminate traffic to, all CLECs, regardless of their access rates. In the *Local Competition Order*, the Commission found that a section 251(a)(1) duty to interconnect, directly or indirectly, is central to the Communications Act and achieves important policy objectives.[172] However, the Commission construed the statute to require only the physical linking of networks, not to impose obligations relating to the transport and termination of traffic.[173] Section 201 empowers the Commission, after a hearing and a determination of the public interest, to order the physical connection of networks and to establish routes and charges for certain communications. This also falls short of creating the blanket duty that the CLECs seek to impose on the IXCs to accept all access service, regardless of the rate at which it is offered. Certainly, we have made no finding that the public interest dictates such broad acceptance of access service, whatever its price. Nevertheless, we conclude that section 201(a) places certain limitations on an IXC's ability to refuse CLEC access service.

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> through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. § 201(a).

[168] Section 251(a)(1) states that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. §251(a).

[169] Teligent Comments at 3-5; Allegiance Comments at 6; ALTS Comments at 25; Alltel Comments at 5; RCN Comments at 6-8; MGC Comments at 17; Minnesota CLEC Comments at 3-5; Winstar Comments at 6-7; RICA Comments at 7-9; USTA Comments at 21-22.

[170] AT&T Reply Comments at 29-30; Sprint Comments at 24-25; WorldCom Comments at 19.

[171] Sprint Reply Comments at 22-24.

[172] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15988-15991 (1996) (*Local Competition Order*). MGC Comments at 17-18.

[173] The Commission's rules implementing section 251(a)(1) define "interconnection" as the "linking of two networks for the mutual exchange of traffic" and state that it "does not include the transport and termination of traffic." 47 C.F.R. § 51.5.